

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1943

No.

THE AMERICAN DISTILLING COMPANY,
Petitioner,

vs.

LOS ANGELES WAREHOUSE COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court of Appeal is reported in 55 A. C. A. (Advance Cal. App. Rep.) page 52, and appears in the record at page 157. The opinion of the Supreme Court of California is reported in 22 A. C. (Advance Cal. Rep.) page 413, and appears in the record at page 165.

JURISDICTION.

A statement of the basis on which this Court has jurisdiction to grant the writ, is set forth at page 5 of the petition.

STATEMENT OF THE CASE.

For the purposes hereof petitioner relies upon the statement of the case on pages 2 to 4, inclusive, of the petition herewith.

SPECIFICATIONS OF ERRORS.

Petitioner submits that the Supreme Court of the State of California erred in the following particulars:

1. In holding that the federal tax on distilled spirits is a property tax.
2. In holding that the owner of distilled spirits in bond becomes personally liable for the payment of the tax as an incident of ownership.
3. In holding that the owner of distilled spirits in bond must reimburse the internal revenue bonded warehouse, which was in possession of the liquor at the time of its accidental destruction, for the amount of the internal revenue tax on the destroyed liquor that the bonded warehouse has been required to pay under its bond to the Government.
4. In holding that as between the distiller and internal revenue bonded warehouse in possession of distilled spirits, the distiller is primarily liable for the

internal revenue tax on distilled spirits removed from bond by accidental destruction while in the custody of the bonded warehouse.

FEDERAL STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved have been printed in an appendix.

Attention is respectfully directed to the following facts:

1. There is nothing in the statutes or regulations that so much as suggests a personal liability on the owner of liquor in bond.

2. The distiller is required to file a bond in a penal sum not less than the amount of tax on the spirits that can be distilled in his distillery during a period of fifteen days, but in no case in excess of \$100,000.00. (I. R. C. §2814.)¹

3. Each internal revenue bonded warehouse is required to file a bond to guarantee payment of the taxes, in an amount not in excess of \$200,000.00. (Double the maximum amount of the distiller's bond.) (I. R. C. § 2879.)

4. After manufacture, the spirits may be placed in internal revenue bonded warehouses and the payment of the tax deferred for a maximum period of eight years. The liquor may be transferred from one bonded

¹The references are to sections of the Internal Revenue Code and regulations set forth in the appendix.

warehouse to another and may be freely traded in while in bond. (I. R. C. § 2879; Reg. pars. 95, 102.)

5. The internal revenue bonded warehouse in custody is made directly liable for the payment of the tax on its removal from bond. (This includes removal by destruction, loss, theft or under any circumstances that the tax is not remitted.) (I. R. C. §§2879, 2880; Reg. pars. 44, 50, 68, 70, 118, 119, 130.)

6. When distilled spirits are transferred in bond from one bonded warehouse to another, the receiving bonded warehouse is made responsible and the liquor is deemed to be in its custody and covered by its bond during transfer. (Reg. par. 44.)

7. For the protection of the receiving bonded warehouse, the spirits can only be moved to its premises on its application and by a means of transportation and carrier designated by such receiving warehouse. This application is made on Form 236. A copy of Form 236 filled out by the plaintiff as receiving warehouse in this case is annexed to the amended complaint. (R. 6A.) (Reg. pars. 103, 113.)

8. There is no provision that the distiller shall be notified of transfer from one bonded warehouse to another (either before or after transfer) or that the distiller shall have anything to say respecting the carrier or means of transfer.

9. While as a practical matter the owner of the distilled spirits would undoubtedly know of the transfer of his liquor from one bonded warehouse to another, and would also be interested in knowing the

carrier or means of transportation employed, there is no provision in statute or regulation requiring that the owner be notified or consulted pertaining to the carrier or means of transportation designated by the receiving bonded warehouse.

10. If the license of a bonded warehouse in which liquor is stored is revoked, the owner of the liquor is required to move it to another bonded warehouse in good standing, and if he does not do so, the liquor is subject to seizure and sale for the payment of taxes thereon and costs and expenses of sale and removal. This is the only duty imposed on the owner by statute or regulation. It implies the very opposite of a personal liability. There is only the right to resort to the liquor itself. (I. R. C. §2874, Reg. par. 120.)

ARGUMENT.

The majority opinion is erroneous for the following reasons:

(a) It places on every owner of liquor in bond a personal liability for the payment of the internal revenue tax thereon, in the event of its accidental loss or destruction while in bond.

(b) It erroneously construes the internal revenue tax to be a property tax, payment of which the owner of the property assumes as an incident of ownership.

(c) It erroneously assumes the value of liquor in bond to the owner to be its value tax paid.

(d) It erroneously concludes, from the false premise (c) and upon the principle, that as between an innocent bailor and bailee, the bailor must bear the loss of the property, that the owner of the liquor in bond as bailor must reimburse the internal revenue bonded warehouse as bailee for the tax on the liquor as a part of the value of the property lost or destroyed.

The minority opinion is erroneous for the following reasons:

(a) It would place upon the distiller ultimate liability for the payment of the internal revenue taxes on all liquor manufactured and sold in bond. The distiller, however, after having sold the liquor in bond for its intrinsic value and subject to tax, loses all contact with or control over the liquor. It is thereafter freely traded in and may be resold and retransferred any number of times during the eight years it may remain in bond and may be moved all over the country. It may also be bottled in bond. No provision exists for the distiller to know of its location or ownership; he is given no notice of, and has no check on, the place where stored or the means of transportation employed on removal from one bonded warehouse to another. The minority conclusion is that in all instances the distiller is primarily and ultimately liable, and that in paying the tax, the bonded warehouse pays not its own obligation, but that of the distiller. The distiller would remain primarily liable, irrespective of the cause or manner of the removal from bond. If such a liability exists, the distiller for his protection must in all instances pay the tax and sell the liquor tax paid. He

could not afford to take the risk of selling the liquor in bond and thereafter being compelled to pay in taxes many times the selling price and without right to reimbursement. This would necessarily limit the extent of manufacture and sale and would defeat the very purpose for which the internal revenue bonded warehouses were created.

(b) The provisions, diligently provided for the protection of the receiving bonded warehouse, that distilled spirits can only be transferred to a receiving bonded warehouse on its application and by a carrier designated by it, become wholly superfluous and unnecessary, and failure to afford the same or similar protection to the distiller becomes inexplicable.

(c) The conclusion is without precedent. It is in conflict with the construction of the Treasury Department charged with the enforcement of the law.¹ Such interpretation is entitled to great weight and consideration.

United States v. Philbrick, 120 U. S. 52, 59, 30 L. Ed. 559, 561.

It is likewise in conflict with two decisions of the United States Circuit Court of Appeals.

United States v. National Surety Company of Kansas City, 122 Fed. 904, 910; certiorari denied by the Supreme Court, 191 U. S. 573, 48 L. Ed. 307;

United States v. Guest, 143 Fed. 456, 459, 460.

¹For convenience, Treasury Decision 20,290 is printed in the appendix.

(d) The fact that the tax in this instance was demanded and collected by the Government from the receiving bonded warehouse and not from the distiller, is in accord with the Treasury Decision referred to. It is unreasonable to believe that it is the practice of the Government to demand and collect the tax from a party secondarily liable, and resort only to the party primarily liable after the security of the party secondarily liable has been exhausted.

CONCLUSION.

Petitioner respectfully submits that a writ of certiorari should issue.

Dated, San Francisco, California,
October 4, 1943.

Respectfully submitted,

THEODORE H. ROCHE,

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NORMAN A. EISNER,
Of Counsel.

(Appendix Follows.)

